92-910

No. 92-807

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Mary Sue Davis Stowe,

Petitioner,

— against —

Junior Davis

and

Ray King, M.D., d/b/a
Fertility Center of East Tennessee,
(Third-Party Defendant)

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Order on Petitions to Rehear of the Supreme Court of Tennessee at Knoxville, dated November 23, 1992.

In The Supreme Court of Tennessee at Knoxville

JUNIOR LEWIS DAVIS,
Plaintiff-Appellee,

vs.

MARY SUE DAVIS,
Defendant-Appellant

Not for Publication

NO. 34
BLOUNT COUNTY

ORDER ON PETITIONS TO REHEAR

The Court has before it two petitions to rehear, one filed by the appellant, Mary Sue Davis, and the other filed jointly by the appellee, Junior Davis, and by the Knoxville Fertility Clinic as putative third-party defendant. Although it would serve the goal of judicial economy if we could direct this order to the Knoxville Fertility Clinic as a party in interest, the record shows that the Clinic was dismissed as a party by the trial court, that the Clinic did not appeal the trial court's judgment, and that it is, therefore, no longer an active party in this lawsuit. Nevertheless, the Clinic is obviously affected by the outcome of this case, and we commend the willingness of its director, Dr. Ray King, to follow the directions of this Court.

1. Petition to Rehear by Mary Sue Davis

The appellant's petition alleges that the Court's opinion incorrectly states the facts. However, the gist of the complaint is, first, that the Court refused to accept as scientific fact the opinions of Dr. Jerome Lejeune and, second, that we did not have his complete testimony before us. If the transcript of Dr. Lejeune's testimony was not complete, it was the obligation of counsel to see that the appellate record presented to the Court of Appeals and to this Court was properly supplemented. The matter of the transcript's purported inadequacy to

convey Dr. Lejeune's testimony has been waived. Furthermore, we find no merit to the contention that the Court failed to accord sufficient weight to the testimony that is included in the record.

The petition also takes issue with our interpretation of the state constitution. We find no merit to the contention that the provisions in Article I, Section 34 must be construed to mean that human embryos are entitled to the same status as "man" under the Tennessee Constitution.

Finally, the appellant's petition takes the position that our opinion violates an executive order, namely Presidential Proclamation No. 5761, signed by Ronald Reagan on January 14, 1988, in which President Reagan "proclaim(ed) and declare(d) the unalienable personhood of every American, from the moment of conception until natural death..." The appellant argues that this presidential proclamation is a "public law" and that its "scope...extends to the Constitution, its interpretation and execution." We know of no authority which mandates our submission to presidential proclamations such as the one involved here, which is in direct conflict with both the state and federal constitutions. We find the argument without merit.

The remainder of the petition is merely argumentative and provides no **legal** basis for a rehearing.

2. Petition to Rehear by Junior L. Davis

In this petition to rehear, Junior Davis and Dr. King seek the Court's guidance in what disposition should be made of the cryogenically-preserved pre-embryos that were the subject of dispute in this case. We had previously indicated in our opinion that the Fertility Clinic was at liberty to follow its normal procedure with regard to surplus or unwanted pre-embryos, as long as the procedure was not in conflict with the opinion. According to Dr. King, however, his usual procedure is to donate surplus pre-embryos to a childless couple for procreational purposes. Such a disposition is **not** authorized under the opinion, because it is the very outcome that Junior Davis has sought to avoid, and one which we have held to be constitutionally unavailable over his objection.

The only other dispositions suggested by the American Fertility Society's Ethics Committee in its June 1990 report, cited in the opinion, would be donation of the pre-embryos for approved research or their discard. Of course, donation for research would require the consent of both Mary Sue Davis and Junior L. Davis. If they cannot agree on this alternative, Dr. King's only other choice is to discard the pre-embryos in question.

We remand this case to the trial court for further proceedings within the narrow limits of this order.

3. Motion to Substitute Counsel of Record

The appellant's motion to substitute as counsel Richard D. Hash of Maryville, Tennessee, is hereby GRANTED. As to the application of attorney John W. Brabner-Smith of Washington D.C. and attorney R. Martin Palmer, Jr., of Hagerstown, Maryland, the Court will permit their appearance in this case only. The names of Mary Sue Davis's former counsel, Kurt Erlenback and Susan Erlenback of Titusville, Florida, will be removed as attorneys of record.

The petition to rehear filed on behalf of Mary Sue Davis is hereby DENIED. The petition to rehear filed on behalf of Junior L. Davis is hereby GRANTED, but only for the limited purpose of remanding this case for an order by the trial court in conformity with this order.

Enter, this _____ day of November, 1992.

PER CURIAM